

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“the Agreement”) is made and entered into between Disability Rights Center-New Hampshire (“DRC”) and Helen Hanks, in her official capacity as Commissioner of the New Hampshire Department of Corrections, and Michelle Edmark, in her official capacity as Warden of the New Hampshire State Prison for Men (referred to herein as the “defendants”), collectively referred to as “the Parties.”

WHEREAS, DRC is the Protection and Advocacy System for New Hampshire, authorized under federal law to investigate alleged abuse and neglect of individuals with disabilities, including individuals with mental illness (*see PAIMI Act, 42 U.S.C. § 10805(a)*);

WHEREAS, DRC initiated litigation against the defendants concerning DRC’s right to access certain records in the matter of *Disability Rights Center-NH v. Hanks, et al*, 1:18-cv-160-LM (hereinafter referred to as the “Litigation”), which is currently pending in the U.S. District Court of New Hampshire;

WHEREAS, the defendants dispute any liability or responsibility for the claims raised in the Litigation;

WHEREAS, the Parties desire to compromise, settle, buy complete peace from, and terminate any and all known and unknown disputes, claims, controversies, demands, actions, causes of action, and litigation as may exist between them and against the Releasees hereinafter named arising from or in any way related to the Litigation, and any damages, costs, expenses, and/or injuries that DRC sustained or may sustain as a result thereof, and in order to avoid the time and expense of further litigation;

WHEREAS, the Parties have consulted with counsel concerning the Litigation and provisions of this Agreement;

NOW THEREFORE, in consideration of the recitals stated above, which are hereby incorporated into this Agreement and made a part hereof, and in consideration of the mutual promises, covenants, agreements, representations, and warranties contained herein, the receipt and sufficiency of which are hereby acknowledged, it is agreed between the Parties as follows:

1. Consideration.

a. Attorneys’ Fees and Costs. The defendants shall pay to DRC, and DRC agrees to accept in full accord and satisfaction of all claims, attorneys’ fees and costs in the amount of **\$38,791.25**, for which 1099 Forms will be issued to DRC. Prior to issuance of this check, DRC will provide the defendants with an executed Form W-9.

b. Access to Records. On April 18, 2018, the court issued an order in the Litigation, granting DRC’s request for a preliminary injunction. The court order is attached hereto as Exhibit A (hereinafter the “Order”), and is incorporated herein by

reference. The Parties agree to be permanently bound by the terms of the Order pertaining to the investigation of P.B. or any related investigation.

For any records that DRC has requested or will request that have not been completed, finalized, created, or discovered, defendants agree to provide each requested record within 3 days of completing, finalizing, creating, or discovering the record, without receiving an additional request beyond DRC's initial request.

The above payment in paragraph 1(a) will be made after this Agreement has been fully signed and within 45 days of the date that the defendants receive the completed W-9 form from DRC.

The Parties hereby agree to the dismissal with prejudice of the above-mentioned action and, except as provided in paragraph 3 herein, without any other causes of action arising out of the Litigation, in their entirety with prejudice, and without further costs or attorneys' fees to any party and waiving all appeal rights.

DRC and the defendants expressly agree that the Parties shall have no obligation for payment of the other party's attorneys' fees or any other payment not expressly set forth in this paragraph 1. Performance of the Parties' commitments herein is expressly conditioned upon the Court dismissing the above-mentioned action with prejudice.

Counsel for DRC shall notify the Court of settlement as soon as the Parties and their counsel have agreed to a final version of this Agreement. Within 30 days of notifying the Court of settlement, DRC will file an assented-to motion pursuant to Rule 41(a)(2) to dismiss the case with prejudice consistent with the terms set forth in this Agreement, subject to the Court retaining jurisdiction solely for purposes of enforcing the Agreement.

This Agreement is binding upon the Parties, their successors, officers, agents, servants, employees, assignees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this agreement.

2. Limited Release. In consideration of the payment to be made by the defendants, described in paragraph 1 herein, and the mutual promises, covenants, agreements, and representations contained herein, DRC on behalf of itself and its successors, officers, agents, servants, employees, assignees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this Agreement, knowingly and voluntarily fully release and forever discharge the defendants from all known and unknown claims, causes of action, suits, litigation, demand, and obligations of every kind, including claims for damages, attorneys' fees and any other form of relief available at law or in equity, which they have or may have by means of any matter, cause or thing whatsoever pertaining to this Litigation, *Disability Rights Center-NH v. Hanks, et al*, 1:18-cv-160-LM, except as provided in paragraph 3 herein. DRC expressly releases and waives any and all claims set forth or that could have been set forth in the Litigation, except as provided in paragraph 3 herein.

3. Breach of Agreement. The failure of any party to insist upon performance of any term of this Agreement, or the waiver by any party of a breach of this Agreement, shall not be construed as permanently waiving any such term or breach. The Parties acknowledge and agree that any Party found to have breached this Agreement may be held liable for damages, reasonable attorneys' fees, and expenses resulting from any such breach and also for equitable relief as may be awarded by the court. The Parties agree that the United States District Court for the District of New Hampshire shall retain jurisdiction over this matter for the purpose of enforcing this Agreement.

4. Integration Clause; Amendment; Governing Law. This Agreement, which consists of four numbered pages and the Order attached as Exhibit A, constitutes the entire, exclusive, integrated agreement of the Parties. It supersedes any previous understandings and agreements between the Parties concerning the subject matter of the instant lawsuit. No amendment of this Agreement shall be valid or effective unless made in writing and executed by the Parties hereto subsequent to the Effective Date of this Agreement. In the event of litigation regarding this Agreement, the Parties expressly submit to the jurisdiction of the federal court located in New Hampshire.

5. Countersignatures. This Agreement may be executed in counterparts, each of which will be deemed an original, and the counterparts together will constitute one and the same agreement, notwithstanding that each party is not signatory to the original or same counterpart.

6. Severability. If any part of this Agreement is held to be invalid or unenforceable, the remaining parts shall remain in full force and effect as if any unenforceable part were not included in this Agreement.

7. Construction. The Parties acknowledge that they each had an equal opportunity to control the language in this Agreement, and that this Agreement was mutually drafted. The Parties agree that in no event shall this Agreement be presumptively construed against any Party.

8. Costs and Fees. Except as specifically set forth herein, the Parties will bear their own costs, expenses and attorneys' fees, whether taxable or otherwise, incurred in or arising out of or in any way related to the Litigation.

9. Consultation with Counsel. In executing this Agreement, the Parties acknowledge that they have been advised to consult with counsel, and that they have executed this Agreement knowingly, voluntarily, and without undue influence or duress. The Parties expressly consent to each and every term and provision of this Agreement.

10. No Admission. The Parties agree that any consideration given or paid with respect to this Agreement is in compromise of disputed claims and that the giving or payment of consideration in exchange for the general release of claims is not, and will not be construed as, an admission of liability or wrongdoing on the part of the defendants,

who deny any liability or wrongdoing as to each and every claim that has been or that may have been asserted against them in this Litigation.

11. Effective Date. This Agreement shall be effective upon entry by the Court of the Stipulation of Dismissal with Prejudice or similar order.

EACH PARTY TO THIS AGREEMENT REPRESENTS AND WARRANTS THAT THE PERSON WHO HAS SIGNED THIS AGREEMENT ON BEHALF OF HIS OR HER ENTITY IS DULY AUTHORIZED TO ENTER INTO THIS SETTLEMENT AND TO BIND THE PARTY TO THE TERMS OF THE AGREEMENT.

So agreed:



Andrew L. Milne
N.H. Bar No. 268073
Attorney for Plaintiff
Disability Rights Center-NH
64 North Main Street, Suite 2
Concord, NH 03301-4913

Date: August 9, 2018



Lindsey B. Courtney
N.H. Bar No. 20671
Attorney for Defendants
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301-6397

Date: August 10, 2018

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Disability Rights Center-NH

v.

Civil No. 18-cv-160-LM

Helen Hanks, Commissioner of the
New Hampshire Department of
Corrections, et al.

O R D E R

This litigation arises from an incident at the New Hampshire State Prison for Men, where "P.B.," an inmate with mental illness, died in his cell as a result of alleged "self-injurious behavior." Doc. no. 1 at 6. Pursuant to its federally mandated duties as a Protection and Advocacy ("P & A") organization, plaintiff Disability Rights Center-NH ("DRC") started an investigation into the matter, but it claims that prison authorities failed to timely respond to its record requests. Seeking to compel access to the requested records, DRC filed this action against defendants Helen Hanks, Commissioner of the New Hampshire Department of Corrections, and Michael A. Zenk, Warden of the New Hampshire State Prison for Men.¹

¹ DRC sues both defendants in their official capacities.

Soon after bringing the action, DRC filed a motion for a preliminary injunction, requesting an order requiring defendants to respond to pending and future record requests within short, definite timeframes. Defendants objected. On April 18, 2018, the court held a hearing, at which it orally granted DRC's motion. The court now memorializes its decision in this notice of ruling.

To obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Bruns v. Mayhew, 750 F.3d 61, 65 (1st Cir. 2014) (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). For purposes of the present motion, however, defendants only dispute that DRC can satisfy the element of irreparable harm. The court accordingly confines its analysis to that issue. See generally Protection & Advocacy for Persons with Disabilities v. Armstrong, 266 F. Supp. 2d 303 (D. Conn. 2003) (discussing federal laws which entitle P & A organizations to seek access to records); Ariz. Ctr. for Disability Law v. Allen, 197 F.R.D. 689 (D. Ariz. 2000) (same).

The crux of defendants' argument is that, while they initially failed to timely respond to DRC's requests, since the institution of this litigation they have complied and will continue to comply with DRC's requests. As a result, DRC faces no irreparable harm.

The court disagrees. Many courts have held that a P & A organization is irreparably harmed if it is "prevented from pursuing fully its right to access records . . . in pursuit of its duty to investigate circumstances providing probable cause to believe abuse or neglect may be occurring." Armstrong, 266 F. Supp. 2d at 311 (collecting cases); see also 42 C.F.R. § 51.41(a) (stating that "[a]ccess to records shall be extended promptly to all" P & A organizations). In this case, the evidence shows—and defendants do not challenge—that defendants unjustifiably failed to respond to DRC's repeated, reasonable requests prior to this litigation. Although defendants now make assurances that this matter will be prioritized, defendants acknowledge that they still have not fulfilled some of DRC's requests from late March. In the face of these continued delays, the court is persuaded that DRC will continue to suffer irreparable harm in the absence of injunctive relief.

Accordingly, the court grants DRC's motion for a preliminary injunction, and orders the following relief:

(1) For presently pending record requests:

- a. Defendants shall produce all requested records within 2 business days from the issuance of the court's oral ruling at the end of yesterday's hearing;
- b. Except that, if defendants cannot obtain and produce any such records within that period:
 - i. Defendants shall provide written notice to DRC within 2 business days from the issuance of the oral ruling, in which they identify the records and explain why such records cannot be produced; and
 - ii. Defendants shall produce all such records within 10 business days from the issuance of the oral ruling.²

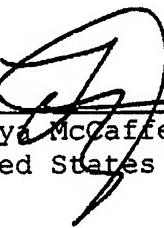
(2) For future record requests, whether pertaining to the investigation of P.B. or to any related investigation:

- a. Defendants shall produce all requested records within 3 business days from the date that defendants receive the request from DRC;
- b. Except that, if defendants cannot produce, or refuse to produce, any such records within that period:
 - i. Defendants shall provide written notice to DRC within 3 business days from the date of receipt of the request, in which they identify the disputed records and explain why such records cannot or will not be produced;

² Thus, for purposes of all pending requests, defendants will have until 5 P.M. on Friday, April 20, 2018, to either produce the requested records or provide the required written notice to DRC.

- ii. Defendants shall meet and confer with DRC within 5 business days from the date of receipt of the request in order to resolve the dispute; and
 - iii. Defendants shall, if the meet and confer does not resolve the dispute, produce the disputed records within 10 business days of the meet and confer.
- (3) The parties may, by agreement, extend or modify these deadlines.

SO ORDERED.



Landy A. McCafferty
United States District Judge

April 19, 2018

cc: Counsel of Record